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THE IMPACT OF THE JUDGEMENT IN CASE C-219/17, BERLUSCONI AND FININVEST, ON COURT JURISDICTION REGARDING LEGALITY OF ACTS BY INSTITUTIONS OF SINGLE RESOLUTION MECHANISM

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Abstract. A case of the European Court of Justice C-219/17, Berlusconi and Fininvest, laid down important rules for differentiating between the jurisdictions of EU courts and national courts in actions challenging the final decisions of composite procedures in the Single Supervisory Mechanism. As this judgement does not cover all scenarios, nor are there such decisions regarding the Single Resolution Mechanism, a universal test is developed for revealing if EU courts or national courts have jurisdiction over acts of composite procedures in the Banking Union. This test is then implemented on the most important acts within the Single Resolution Mechanism.

Keywords: Banking Union, Single Resolution Mechanism, Single Supervisory Mechanism, EU court jurisdiction, composite procedures

Abbreviations²

Introduction

Should a national resolution authority or the EU Single Resolution Board wrongly put a bank under resolution and transfer shares or assets of the bank to another person, or the European Commission endorse the relevant resolution scheme on erroneous assumptions originating from national authorities, it would be wise for the bank to seek justice from the courts. However, it is far from clear if national or EU courts have the jurisdiction to decide on the legality of these problematic decisions regarding bank resolution, which are the results of proceedings involving both an EU institution and national authorities.

In legal literature, the question was raised as to whether certain decisions made in the framework of the Single Supervisory Mechanism (SSM), which deals with prudential supervision of credit institutions and investment firms, should be under the jurisdiction of EU or national courts, as both EU and national authorities are involved in making the procedures leading to final decisions (Demkova, 2019; Wissink, 2014; Witte, 2014). The European Court of Justice (ECJ) has laid down the rules for deciding between national and EU court jurisdictions on reviewing the legality of acts and proposals adopted in SSM with its judgement in case C-219/17, *Berlusconi and Fininvest v. Banca d'Italia* and others. There is no similar judicial practice regarding the Single Resolution Mechanism (SRM) that sets the processes for recovery and resolution of individual credit institutions and investment firms, as well as corresponding groups (entities). This article examines the possible

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² ECB – European Central Bank; ECJ – European Court of Justice; NCA – National competent authority; NRA – National resolution authority; SRM – Single Resolution Mechanism; SSM – Single Supervisory Mechanism; The Board – Single Resolution Board.

effects of the preliminary ruling in case C-219/17 in combination of other relevant rulings on the SRM regarding questions of whether EU or national courts have jurisdiction over the acts and decisions of institutions having powers within the SRM. As there are no specific ground-breaking rulings by the ECJ dealing with court jurisdiction regarding the legality of acts by institutions of the SRM, the application of the same principles laid down for the SSM could be a viable way of defining the correct court. The aim of this article is to propose a test to determine the jurisdiction of reviewing the legality of acts adopted by institutions pursuant to EU regulation No. 806/2014 (SRM Regulation). This article focuses on acts by public authorities towards subject entities of the corresponding legislation, and does not deal with disputes between the public authorities.

For the purpose of this article the scope of included acts is not limited to formal binding decisions, as the objective is to cover a wider range of borderline cases with legal situations unclear – decisions to initiate procedures, preparatory acts and non-binding proposals made by institutions that other institutions may base their final decisions on – all of which are referred to as acts. Guidelines by the European Supervisory Authorities as soft law are not included (for more on ESA guidelines see Schemmel, 2016). The test developed is implemented to resolve the questions of jurisdiction over named acts.

This article consists of three main chapters. Firstly, the ECJ judgments with the main rules laid down are studied and the test for finding the jurisdiction is developed. Then the similarities and differences in structures of the SSM and the SRM, along with the applicability of said rules and tests of the SSM to the SRM are dealt with in the second main chapter. In the third main chapter, the test outlined in the first chapter is applied to the main acts covered by the SRM and the resulting jurisdiction over specific acts is outlined.

1. Principles laid down by ECJ judgement in Case C-219/17 and three-stage jurisdiction test

1.1. Reasoning behind relevant judgements by the ECJ

Court jurisdiction problems are part of a vast range of legal and practical problems that have been under discussion in legal literature, with the creation of the composite procedures and mixed administration involving the ECB and NCAs (See Bastos, 2019; Demkova, 2019; Wissink, 2014, 2017). The ECJ Grand Chamber gave its judgement in Case C-219/17, Berlusconi, (ECJ judgement) on 10 December 2018. It has been referred to as a remarkable judgement in the legal literature because of its approach to handling the issue of judicial review in the context of composite procedures, i.e. the procedures which involve the participation of the ECB, as well as that of NCAs (Annunziata, 2019, pp. 13-14; Demkova, 2019, pp. 210-211). The proceedings are centred around Italian company Finanziaria d'investimento Fininvest SpA (Fininvest), and Silvio Berlusconi. Complications arose as several disputes and court proceedings were taking place in parallel in both EU Courts and national courts, regarding situations before and after the regulations in question came into effect and the SSM was created. The basis of the ECJ judgement was the request for preliminary ruling under Article 267 of the TFEU. It is relevant to this paper to consider whether the TFEU gives the jurisdiction to EU courts or national courts (see full questions in para. 29 of the ECJ judgement) in an action challenging decisions to initiate procedures, preparatory acts, and non-binding proposals adopted by the NCAs in procedures governed by the provisions of EU directive No. 2013/36/EU (CRD IV), SSM Regulation, EU regulation No. 468/2014 (SSM Framework Regulation), and national law.

According to para. 27-29 of the ECJ judgement, in the 1990s Mr. Berlusconi acquired, through Fininvest, a holding in a company subject to supervision of qualifying holdings in Italy from 2014. Mr. Berlusconi was found guilty of tax fraud with decision No. 35729/13 of the Italian Court of Cassation (Corte suprema di cassazione), after which the competent Italian authorities determined that Mr. Berlusconi had ceased to fulfil the reputation criteria requirement laid down by the applicable legislation and that, accordingly, the part of Fininvest's holding in the mixed financial holding company that exceeded the limit of qualifying holding had to

be divested. Mr. Berlusconi and Fininvest challenged the decision of the Italian authorities before the Italian courts. Their action was dismissed in the first instance, but the Italian Council of State (Consiglio di Stato) decided, with judgement No. 882/2016 of 3 March 2016, in favour of Mr. Berlusconi and Fininvest. The appellants were successful in their challenge of relevant decisions in front of the competent national authorities taking place in the national courts. It can be gleaned from chapter 3 of the proposal for SSM Regulation, as well as from chapters 3.1 and 4.1.1 of the proposal for SRM Regulation, that the uniform application of material legislation was one of the main aims of establishing the SSM, as well as the SRM with their corresponding structure. If national courts were to have jurisdiction in all cases regarding acts by national authorities in composite procedures, with the EU institution making the final decision, it could be a potential source of uneven application of the EU legislation.

According to paragraphs 30-34 and 37 of the ECJ judgement, in the meantime Fininvest became a direct owner in a credit institution through mergers and acquisitions, interpreted by the Bank of Italy as the national NCA and the ECB as a fresh acquirement of a qualifying holding. The Bank of Italy forwarded to the ECB, pursuant to Article 15(2) of the SSM Regulation, a proposal for a decision containing, similarly to the previous Italian NCA's decision, an adverse opinion as to the reputation of the acquirers, and invited the ECB to oppose the acquisition. The ECB approved the final decision in line with the proposal. Fininvest and Mr. Berlusconi challenged the ECB's decision before the General Court (*Fininvest and Berlusconi v. ECB*, T-913/16, pending), and acts by the Bank of Italy in national courts led to a preliminary ruling in case C-219/17.

Advocate General Manuel Campos Sánchez-Bordona first delivered the opinion in case C-219/17. The Advocate General correctly pointed out in paragraphs 64-79 of the opinion that, in previous instances where an EU institution makes the binding decision in a composite procedure, the ECJ has held in Case C-97/91, *Oleificio Borelli SpA v. Commission*, that where the EU institution is bound to the decisions of national authorities, EU courts have no jurisdiction to rule on the lawfulness of measures adopted by national authorities. The ECJ has also held in Case C-60/81, *IBM v. Commission*, and joined Cases C-463/10 P and C-475/10 P, *Deutsche Post and Germany v. Commission*, that no acts taken in preparation of the final decision are reviewable by either EU or domestic courts (for more on prior division of jurisdiction see Demkova, 2019, p. 215). The opinion of the Advocate in case C-219/17 was that Article 263 of the TFEU confers on the Court of Justice exclusive jurisdiction to review the legality of measures adopted as part of the procedure provided for in Article 4(1)(c) and Article 15 of the SSM Regulation, and Articles 85 to 87 of the SSM Framework Regulation. The Advocate General also found that Article 263 of the TFEU prevents national courts from reviewing the legality of decisions to initiate procedures, measures of inquiry, and proposals adopted at national level by the NCAs in the course of that procedure, which culminates in a binding decision by the ECB (para 115 and 126 of the opinion). Petit (2019) has found this opinion to downsize the sovereignty of NCAs and their role (p. 114).

The final ruling of the ECJ was in line with the opinion of the Advocate General, changing the previous position of judgement in Case C-97/91, *Borelli*. It can be understood even contrary to the latter (Bastos, 2019, p. 1375). The ECJ ruled that the TFEU precludes national courts from reviewing the legality of decisions to initiate procedures, preparatory acts, or non-binding proposals adopted by national competent authorities in the procedures of assessing acquisitions and disposals of qualifying holdings in credit institutions, and the nature of the claim does not matter.³ The ECJ explained, in paragraphs 41-45 of the ECJ judgement, the effects on the division of jurisdiction between EU Courts and national courts that result from the involvement of national authorities in the course of a procedure leading to the adoption of an EU act. According to the ECJ, it is

³ The procedure in question is provided for in Articles 22 and 23 of CRD IV, in Articles 4(1)(c) and 15 of SSM Regulation, and in Articles 85 to 87 of SSM Framework Regulation.

necessary to distinguish between two situations. Firstly, the involvement of national authorities in the course of procedures leading to the adoption of binding acts by EU institutions with the final decision-making power, without being bound by the preparatory acts or the proposals of the national authorities, does not affect the classification of the final act as an EU act within the exclusive jurisdiction of EU Courts. It falls to the EU Courts to review the legality of EU acts, to rule on the legality of the final decision adopted by the EU institution, and to examine any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision. Demkova (2019, p. 214) has understood this approach to indicate that the member state courts are precluded from reviewing any steps leading to the adoption of a final decision, regardless of the national procedural rules or the legal effects of such preliminary steps in the domestic legal order. The exclusive jurisdiction of the EU courts would then demand a review of national preliminary conduct governed by respective national laws, to be conducted by the Union courts.

Secondly, the ECJ found in paragraphs 45-46 that an act of a national authority that is part of a decision-making process of the EU does not fall within the exclusive jurisdiction of the EU Courts. This is applicable where it is apparent, from the division of powers between the national authorities and the EU institutions, that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act. Specifically, an act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution. The national courts have jurisdiction over such acts, making reference to the EU Courts for a preliminary ruling where appropriate.

The ECJ did not explicitly explain the reverse situation, where national authority may have the final decision-making power but is bound by the acts of the EU institution. In its reasoning behind the ECJ judgment, the ECJ referred to ECJ judgment in Case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, which may also contain the solution to this situation. According to the ECJ judgement in Case C-314/85, the national courts may consider the validity of measures taken by Community institutions but have no jurisdiction themselves to declare that measures taken by Community institutions are invalid, and if the national court has any doubts on the validity of Community acts, it must refer the case to the ECJ. This interpretation was last upheld in ECJ judgment in Case C-644/17, *Eurobolt BV*. It was also upheld in paragraph 42 of the ECJ judgement in the *Berlusconi* case that Article 263 TFEU confers upon the ECJ exclusive jurisdiction to review the legality of acts adopted by the EU institutions. Combining the interpretations by the ECJ in Cases C-219/17, *Berlusconi*, and C-314/85, *Foto-Frost*, in situations where a national authority has the final decision-making power but is bound by the acts of EU institutions, the jurisdiction of deciding over the legality of the final act lies with the national courts, but only to the extent of the discretion available to the national authority. If the validity of the final act depends on the validity of the EU institution act limiting the national authority's discretion, the EU Courts should have jurisdiction over deciding on the legality of this EU institution act. Therefore, the national courts always have jurisdiction over the legally binding acts formally adopted by national authorities, irrespective of whether they are influenced by any acts of the EU or not. The EU Courts always have jurisdiction over the legally binding acts formally adopted by EU institutions, and over legally non-binding acts adopted by the national authorities in proceedings, the outcomes of which are acts adopted by EU institutions.

The ECJ has also ruled in Cases T-281/18, *ABLV Bank v. ECB*, and T-283/18, *Bernis and Others v. ECB*, that the ECB's decisions on entities failing or being likely to fail within the meaning of Article 18(1) of SRM Regulation that the ECB forwarded to the Board, are not formal decisions regarding non-compliance but preparatory measures for the later decision by the Board. Action has been brought against the named decisions by the Board in pending Case T-282/18, *Bernis and Others v. SRB*. These judgements affirm that the logic of preparatory acts and final binding administrative acts is also true for the procedures covered by the SRM.

1.2. Three-stage jurisdiction test

Based on chapter 2.1, the rules for deciding between EU or national court jurisdiction for reviewing the legality of acts, including decisions to initiate procedures, preparatory acts, or non-binding proposals adopted as part of composite procedures, could be translated into a three-stage test (the test) which could help to solve practical problems when determining the court jurisdiction.

Stage 1 of the test determines if the EU institution or national authority has the formal final decision-making power. For this the body having formal decision-making power must be determined.

Stage 2 of the test determines if the authority making the final decision has full or limited discretion in making the decision. For this it must be determined if the EU institution making the formal final decision is bound by acts of a national authority (e.g., NCA or NRA) or vice versa.

Stage 3 of the test combines the answers for stages 1 and 2. If a national authority has the formal final decision-making power and has full discretion, then the national courts have the jurisdiction to rule on the legality and defects of this act by national authority. If a national authority has the final decision-making power but its discretion is limited to an act by an EU institution, then the national courts have the jurisdiction to rule on the legality and defects of acts by national authorities that is limited to the discretion available to the national authority, and EU Courts have jurisdiction to rule on the legality of the act by an EU institution.

If the EU institution has the formal final decision-making power, and has full discretion in making the decision, then the EU Courts have the jurisdiction to rule on the legality of the final decision, as well as on any defects of acts by national authorities affecting the validity of the final decision. If the EU institution has only a limited or no discretion in making the decision, then the EU courts have the jurisdiction to rule on the legality of the final act by an EU institution, and national courts have the jurisdiction to rule on the legality and defects of these acts by national authorities.

This verdict on jurisdiction may have an impact not only on proceedings, but also on claims and remedies available for the applicant that are out of the scope of this article. Applying this test, deriving from multiple judgements by the ECJ, to specific acts given in proceedings covered by the SRM Regulation will help in practice to determine if the EU courts or national courts have jurisdiction in these specific cases. For this test to be applicable on acts covered by the SRM, it must be examined if there are any essential structural or material differences between the SSM and the SRM that would preclude applying this test to the acts of SRM.

2. Structural and material preconditions of the three-stage jurisdiction test – resemblances between the SSM and SRM

2.1. Positioning and aims of the SSM and the SRM

It must be verified that the structural framework of, or material decision-making logic in, the SRM does not differ from that of the SSM so considerably that it would make application of the test established in chapter 2.2 impossible. For stage 1 of the test to be applicable, there needs to be a division of powers between EU institutions and national authorities within the SRM as there is within the SSM. For the stage 2 to be applicable, there must exist a framework between the EU and national authorities in the SRM allowing composite procedures similarly to the SSM.

Most importantly the contents, references to judgements, and wording of the reasoning covered in chapter 2.1 imply that the ECJ considerations for distinguishing between two distinct situations when deciding the

jurisdiction over deciding the lawfulness of an NCA act, given in paragraphs 43-46, should not be considered to be SSM specific or even Banking Union specific.

Moloney has summarised that the SSM and the SRM are the two core structures of the Banking Union (2014, p. 1611), which was one construct to address problems that arose during the financial crisis in the EU (2017, p. 144). The Banking Union has been characterised by Ferran (2014) as an “odd construction born of compromises and shaped to fit into legal territory bounded by EU Treaty constraints that cannot be adjusted in the current political environment” (p. 2), showing the challenges behind creating these structures. On a conceptual basis, the SSM and the SRM are both mechanisms combining the EU and national authorities, and deal with the centralization and division of the competencies of the authorities involved within the Banking Union.

According to Article 6 of the SSM Regulation, the SSM is structurally composed of the ECB and NCAs of participating member states, while Articles 1, 4, and 5 and Chapter III of the SSM Regulation gave the ECB prudential supervisory powers. These powers relate to specific material rules included primarily in EU Regulation No. 575/2013/EU (CRR), the CRD IV, and respective national legislation transposing the CRD IV. According to Article 6(1) of the SSM Regulation, the ECB is responsible for the effective and consistent functioning of the SSM, and for that the ECB has established the framework for cooperation within the SSM with regulation No. 468/2014 (SSM Framework Regulation).

The legal framework of SRM, providing its structure, is comprised of SRM Regulation that established the SRM (Article 1), the Board (Article 42), and the Single Resolution Fund (Article 67), as well as a separate intergovernmental agreement detailing the financing agreements of the Single Resolution Fund. In that respect, the SRM differs from the SSM as a new agency – the Board – was created as a centralised body. According to Article 1 of the SRM Regulation, the SRM is composed of the Board, the Council, the Commission, and the NRAs. It has been emphasised that resolution can sufficiently complement supervision to form an effective Banking Union only if the resolution authority has strong, broad powers that are not subject to the veto of an interested member state (Gordon & Ringe, 2015 p. 1350). These material rules of governing are laid down in EU directive No. 2014/59/EU (BRRD).

As the SSM and the SRM both compose of central EU bodies (ECB and the Board) and national authorities (NCAs and NRAs), as well as the material rules of governing including harmonised EU legislation dealing with the same subject entities, it can be concluded that, regardless of differences, the basic compositional idea and legal structure of SRM closely mirrors that of the SSM. Therefore, these differences should not preclude application of the test.

Application of the test also implies that cooperative framework and composite procedures should exist involving EU institutions and national authorities. For the SRM there exists cooperation framework similar to the SSM, laid down in Articles 31 and 51(1)(q) of the SRM Regulation with the Board in a coordinating role. The Board has materialised its coordinating powers, primarily with the decision of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the SRM between the Board and NRAs (SRB/PS/2018/15). According to Article 7 of the SRM Regulation, the Board also has centralised powers relating to specific functions. The positioning of the Board and NRAs within the SRM reflect the positioning of the ECB and NCAs respectively within the SSM.

2.2. General division of powers within the Single Resolution Mechanism

According to Article 7, the Board is responsible for the effective functioning of the SRM and for decisions regarding a number of entities. These entities include those under direct ECB prudential supervision, all cross-border groups, entities the Board decides to exercise its powers on directly, entities given under its authority by member states, and in situations where the resolution action requires the use of the Single Resolution Fund. NRAs are responsible for decisions regarding all other entities. Article 67 of the SRM Regulation established the

Single Resolution Fund as a separate entity owned by the Board. The Single Resolution Fund does not have its own separate management or independence, and thus there are no separate decisions or acts by the Single Resolution Fund.

According to Articles 18(7) to 18(10), the European Commission is responsible for initiating the resolution and, according to Articles 18(7) and (8), the Council of the EU may be involved in deciding on the initiation of the resolution. This means that the Commission and the Council, to the extent of powers relating to resolution procedures under SRM, are included in this Article. Including the Commission and the Council into decision-making processes may have an impact on the idea of a single centralized authority out of reach of member states and give rise to other problems out of the scope of this Article (regarding the Commission and the Council, see Szpringer & Szpringer, 2016; Busch, van Rijn & Luisse, 2019).

It is important to note that the BRRD and SRM cover bank recovery and resolution framework consisting of two distinct concepts – the recovery of entities composing of regulations regarding recovery planning and early intervention, and the resolution of entities (Maarand, 2019). According to BRRD and article 4(1)(i) of the SSM Regulation, the ECB and NCAs have recovery and resolution related tasks. However, Articles 4(1)(i) and 6(6) of the SSM Regulation explicitly cover the concept of recovery, making these powers of the ECB and NCAs clearly covered by the ECJ judgement and thus putting these out of scope of the specific testing undertaken by this article.

3. Jurisdiction over main acts covered by the SRM

In this chapter, the jurisdiction of the main acts adopted in recovery and resolution proceedings is defined by applying the test provided in chapter 2.2. The acts are grouped by institution with the formal final decision-making power, thus by the outcome of Stage 1 of the test. The analysis is based on distinct action by the authorities provided for in the legislation, meaning that general clauses for cooperation and information sharing⁴ are not considered limiting discretion in the meaning of the test. Neglecting general cooperation or information sharing responsibilities by authorities within the composite procedures is a problem for further academic studies. References to clauses of legal acts in this chapter are that of the SRM Regulation if not stated otherwise.

3.1. Acts by the European Union institutions

3.1.1. Acts by the Single Resolution Board

According to Article 8, the Board is the final decision maker regarding drawing up and adopting resolution plans for entities under its authority. Regarding stage 2 of the test, there are possible impacts on the discretion stemming from mandatory consultation with the ECB, relevant NCAs, and relevant NRAs set out in Article 8(2). From the explanations, aims, and objectives provided in the proposal for the SRM Regulation (2013/0253 (COD)), or from the wording and context of the clause in question, it cannot be concluded that this consultation may in any way legally restrict or limit the discretion of the Board in their final decision making. Moreover, consultation between institutions implies even less significant impact than decisions to initiate procedures, preparatory acts, and non-binding proposals that were subject to the ECJ judgment. The consultation should thereby be interpreted in line with the general cooperation and information sharing clauses that are, according to recitals 10, 12, 15, 18 and 26, intended to bolster efficiency of the resolution process by letting other relevant institutions give their opinion on planned acts. A second possible impact on discretion lies in Article 8(2), according to which the Board may require the NRAs to prepare and submit to the Board draft resolution plans. These are preparatory acts or, depending on the input of NRAs, non-binding proposals, with the final decision making not bound to these drafts. Moreover, according to Article 8(3), the Board can issue guidelines and address instructions to the NRAs for the preparation of draft resolution plans relating to specific entities or

⁴ For example, Articles 8(4), 8(13), 11(10), 12(15), 13(3)(3), 30 and 31 of the SRM Regulation.

groups. The means for guiding the cooperation processes with NRAs are further detailed in Article 31(1), giving the Board the authority to issue guidelines and general instructions to NRAs according to which the tasks are performed and resolution decisions are adopted by NRAs in composite procedures, as well as the right to receive the NRAs draft decisions. This means that even the preparation of the drafts by the NRAs is under the direction of the Board. The result of stage 2 of the test, therefore, is full discretion for the Board, and stage 3 concludes that EU courts have the jurisdiction to rule on the legality of the final decision, as well as on any defects of acts by national authorities affecting the validity of the final decision.

According to Article 8(12) the Board is the final decision maker on the date by which the first resolution plans shall be drawn up by the entities under its authority. There are no impacts on the discretion evident, meaning the EU courts have jurisdiction to rule on the legality of these types of decisions by the Board, as well as on any defects of acts by national authorities affecting the validity of the final decision.

According to Article 10(1), the Board has the final decision-making power on assessment of the extent to which entities under its authority are resolvable. The Article referred to compels the Board to prior consultation with the relevant NCAs, the ECB, and the NRAs. There is no evidence that the nature of consulting in Article 10(1) differs from that of Article 8. The Board's discretion may be limited by the obligation to take into account the relevant warnings and recommendations of the European Systemic Risk Board, and the relevant criteria developed by the European Banking Authority (Article 10(5)). The European Systemic Risk Board⁵ and the European Banking Authority⁶ are both EU institutions, and cannot alter the jurisdiction between EU courts and national courts. Therefore, the EU courts have the jurisdiction to rule on the legality of these types of decisions by the Board, as well as on any defects of acts by national authorities affecting the validity of the final decision.

According to Article 11(1), the Board has the final decision-making power to apply simplified obligations in relation to the drafting of resolution plans and waiving the obligation of drafting resolution plans regarding the entities under its authority. There are two possibilities for the proceedings to begin to head towards final decisions in these cases. Firstly, the Board may decide these questions on its own initiative after consulting the relevant NRA. It has been established that consultation has no effect on discretion. Secondly, the Article in question provides the procedure to start upon a proposal by an NRA. Article 11(2) specifies the entities and conditions for the proposition by the NRAs. The proposal by the NRA to the Board for the withdrawing of simplified obligations, or the grant of a waiver, is covered in Article 11(9) with similar procedures. Article 12(11) provides the Board the final decision-making power to decide that the minimum requirement for own funds and eligible liabilities is partially met, with a similar process and the same potential factors limiting the discretion. NRAs may, in all named situations, adopt decisions to initiate procedures or non-binding proposals to the Board, which has the final decision-making power. According to the ECJ judgement in a similar case regarding the SSM, these acts do not hinder the discretion available for the Board. In this case, the EU courts have the jurisdiction to rule on the legality of these types of decisions by the Board, as well as on any defects of acts by national authorities affecting the validity of the final decision.

According to Article 16 the Board shall decide on resolution actions, which means, according to Article 3(1)(10); the decision to place an entity under resolution pursuant to Article 18; the application of a resolution tool (Chapter IV of the BRRD); or the exercise of one or more resolution powers (Chapter IV of the BRRD). The resolution actions are subject to adoption and approval of the resolution scheme, according to the process stipulated in Article 18. Article 18(7) sets out approval, by the Commission or the Council, for the resolution scheme adopted by the Board according to Article 18(1). Article 19(1) further limits the adoption of the resolution scheme if the resolution action involves the granting of State aid, depending on a separate decision by the Commission for using such aid. Consequently, the Board's discretion is limited by the Commission and the Council in adopting the resolution scheme, as well as deciding on resolution actions. As the Board, the

⁵ Established by Regulation (EU) No. 1092/2010 of the European Parliament and of the Council.

⁶ Established by Regulation (EU) No. 1093/2010 of the European Parliament and of the Council.

Commission, and the Council are all EU institutions and cannot alter the jurisdiction between EU Courts and national courts, the EU Courts have the jurisdiction to rule on the legality of these types of decisions by the Board, as well as on any defects of acts by national authorities affecting the validity of the final decision.

The Board also has powers to impose penalties according to Articles 38 to 41, whilst apparently having full discretion when doing so. This means, according to stage 3 of the test, that EU Courts have the jurisdiction to rule on the legality of the final decision, as well as on any defects of acts by national authorities affecting the validity of the final decision. According to a special clause in Article 41(3), enforcement may be suspended only by a decision of the ECJ, however the courts of the member state concerned have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

3.1.2. Acts by the European Commission and the Council of the European Union

Article 18(7) provides exclusive powers for the Commission and the Council for endorsing, demanding modification, or objecting to the resolution schemes. The Commission must decide its action within 24 hours of receiving the resolution scheme from the Board, and may endorse or object to the discretionary elements of the scheme. If the Commission finds problems with the public interest or the use of the Single Resolution Fund, it may, within 12 hours, propose that the Council object to the resolution scheme, or approve or object to modifications to the amount of the Single Resolution Fund provided for in the resolution scheme. The legal consequences of the failure to act within the time limits by the Commission or the Council are not entirely clear. The Article in hand provides that the resolution scheme may enter into force only if no objection has been expressed by the Council nor by the Commission, within a period of 24 hours after its transmission by the Board. In legal literature, the failure to act or the lack of objection by the Commission have been considered as evidence of the Commission endorsing the resolution scheme (Zavvos & Kaltsouni, 2015, p. 137). There are no restrictions to the discretion of the Commission. The Council's discretion is limited to the Commission's proposals to the Council. As both are EU institutions, the EU Courts have the jurisdiction to rule on the legality of the final decisions, as well as on any defects of acts by national authorities affecting the validity of the final decision.

3.2. Acts by the national resolution authorities

NRAs' powers for final decisions are limited to entities not covered by the Board's authority, and are subject to the general cooperation clauses of the SRM Regulation. Articles 31(1)(a) and 31(1)(d) give the Board powers to issue guidelines and general instructions to NRAs on how to perform their tasks and adopt resolution decisions, as well as to receive from NRAs draft decisions on which it may express its views, and indicate where it thinks the draft does not comply with SRM Regulation or with the Board's general instructions. The Board's referred powers are limited to effective and consistent application of Article 31(1) that sets responsibilities on the Board to perform its tasks in close cooperation with NRAs, and approve a framework to organise the practical arrangements for the implementation of the same Article. Similarly, Article 7(3) provides that NRAs shall inform the Board of the measures that NRA plans to take, and sets a requirement for close coordination with the Board when taking those measures. It has been covered in chapter 3.2 that the Board has materialised its coordinating powers primarily with the decision of 17 December 2018, establishing the framework for cooperation within the SRM (SRB/PS/2018/15). This clause is paired with the Board's power, under Article 7(4), to issue a warning to an NRA after receiving a notification from the NRA of adopting a measure pursuant to Article 31(1), if the Board considers the draft decision not in compliance with the SRM Regulation or its general instructions. It can at any time decide, in particular if its warning is not appropriately addressed, to exercise directly all of the SRM Regulation powers regarding entities otherwise under NRAs responsibility. Interestingly the Commission proposal for the SRM Regulation did not contain these tools for the Board to influence the NRAs. There is also no clause in the SRM Regulation obliging the NRAs to follow these guidelines and general instructions in question. This setup and lack of clear obligation indicate that the nature of guidelines and general instructions by the Board under Article 31(1)(a) are not legally binding to the NRAs in the decision-making process. Therefore, although the practical outcome of the possible next steps by the Board

could be intimidating enough to follow, the obligation for coordination provided for in Article 7(3), and the guidelines and general instructions provided for in Article 31(1)(a), should be considered not to legally limit the discretion of the NRAs as long as the Board has not decided to take over the responsibilities, thus depriving NRA of its powers.

According to Article 9, the NRAs are responsible for the final decision regarding drawing up and adopting resolution plans for all entities under their authority. Regarding stage 2 of the test, NRAs must consult with relevant NCAs and NRAs before preparing the resolution plans. There are no grounds to presume the consultation here is of a different nature to that covered in chapter 4.1.1. and in this chapter above, meaning the obligation for consultation does not impact the NRAs discretion, and the national courts have the jurisdiction to rule on the legality and defects of these acts.

Article 12(2) is connected to Article 9 in stating that when drafting resolution plans NRAs shall, after consulting competent authorities, determine the minimum requirement for own funds and eligible liabilities, subject to write-down and conversion powers regarding entities under its authority, and that the procedure established in Article 31 shall apply. The effect of Article 31 is established in this chapter above, but Article 12(3) goes further in this procedure, giving the Board the right to issue guidelines and address instructions to NRAs relating to specific entities. Guidelines and instructions regarding specific entities differ from guidelines and general instructions covered previously in this chapter. The difference in wording and nature of the two situations indicates an impact on the discretion of NRAs in the meaning of stage 2 of the test. According to stage 3 of the test, this results in the national courts jurisdiction to rule on the legality and defects of acts by NRAs. This is limited to the discretion available to the national authority, and EU courts have jurisdiction to rule on the legality of the guidelines and instructions by the Board.

According to Articles 8(12) and 7(3), the NRAs are the final decision makers who provide the date by which the first resolution plans shall be drawn up by the entities under their authority. There is no impact on the discretion evident resulting in the national courts jurisdiction to rule on the legality and defects of this act by the NRA.

According to Articles 10(1) and 7(3), the NRAs have the final decision-making power on the assessment of the extent to which entities under their authority are resolvable. Article 10(1) compels consultation with other authorities. Article 10(5) sets the obligation to take into account the relevant warnings and recommendations of the European Systemic Risk Board and the relevant criteria developed by European Banking Authority in considering the identification and measurement of systemic risk. Obligations to take into account warnings and recommendations from EU institutions limit the discretion of the NRAs. This results in the national courts jurisdiction to rule on the legality and defects of these acts by NRAs that is limited to the discretion available to the national authority, and the EU courts jurisdiction to rule on the legality of the acts by the European Systemic Risk Board and the European Banking Authority.

According to Article 11(1) and 7(3), the NRAs have the final decision-making power to apply simplified obligations in relation to the drafting of resolution plans and waiving the obligation of drafting resolution plans regarding the institutions under its authority. Article 12(11) provides the NRAs final decision-making power to decide that the minimum requirement for own funds and eligible liabilities is partially met through contractual bail-in instruments regarding the institutions under its authority. The NRAs are the final decision-makers in these proceedings, and there are no special limits to their discretion. Therefore, the national courts have jurisdiction to rule on the legality and defects of these acts by NRAs.

According to Article 12(14), the Board shall address its decision referred to in Article 12(1) (determination of the minimum requirement for own funds and eligible liabilities) to the NRAs, who shall implement the instructions of the Board in accordance with Article 29. The Board shall then require that the NRAs verify and ensure that institutions and parent undertakings maintain the minimum requirement for own funds and eligible liabilities laid down in Article 12(1). According to Article 29(1), NRAs shall implement all decisions addressed

to them by the Board. The imperative nature of the NRAs' obligation to obey clearly has a limiting effect on the discretion of NRAs. It is important to note that the legislation provides a clear administrative act by the Board differentiating this situation from the guidelines and instructions covered in chapter 4.1.1. and in this chapter above. As a safeguard, measures for the Board to deal with non-compliance by the NRAs have been laid down in Article 29(2), with NRAs obligated to obey the safeguard measures in Articles 29(3) to 29(5). In this situation the NRA has the final decision-making power, but its discretion is limited to acts by the Board. According to stage 3 of the test, this results in the national courts having the jurisdiction to rule on the legality and defects of acts by NRAs. This is limited to the discretion available to the NRA, and the EU courts have jurisdiction to rule on the legality of the acts by the Board. The same reasoning and assessment applies to the NRAs' obligations regarding the write-down or conversion of relevant capital instruments (Article 21(10) and (11)).

According to Articles 16 and 7(3), the NRAs decide on resolution actions regarding institutions not under the authority of the Board. Similarly to the Board, the resolution actions by the NRA are subject to the adoption of the resolution scheme by the NRA according to Articles 18(1) and 7(3), and the approval of the resolution scheme by the Commission or by the Council according to Article 18(7). This is further limited by the Commission adopting a decision concerning State aid according to Article 19(1) if applicable, as Article 7(3) does not provide the NRAs with the obligation or right to transmit the resolution scheme to the Commission for deciding, leaving that function to the Board as that is a preparatory act. Consequently, the NRAs' discretion is limited by the Commission and the Council in adopting the resolution scheme, and in deciding on resolution actions. In this case, the result of the test is that the national courts have the jurisdiction to rule on the legality and the defects of acts by NRAs that is limited to the discretion available to the national authority, and EU courts have the jurisdiction to rule on the legality of the acts by the Board, the Commission, and the Council.

Article 18(9) provides that the Board shall ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant NRAs, and that the resolution scheme shall be addressed to the relevant NRAs. It shall also instruct those NRAs which shall take all necessary measures by exercising resolution powers to implement the resolution scheme in accordance with Article 29. Where state aid or Single Resolution Fund aid is present, the Board shall act in conformity with a decision on that aid taken by the Commission. In this situation, the NRA has the final decision-making power regarding exercising resolution powers, but its discretion is limited to acts by the Board, the Commission, and the Council covered previously in chapter 4.2. According to stage 3 of the test, this results in the national courts having jurisdiction to rule on the legality and defects of acts by NRAs that is limited to the discretion available to the NRA, and EU courts have the jurisdiction to rule on the legality of acts by the EU institutions.

Conclusion

The ruling and reasoning by the ECJ in case C-219/17, *Berlusconi*, set rules on deciding the court jurisdictions of acts of the SSM composite procedures involving EU institutions as well as national authorities. It was established in this article that the ruling in case C-219/17, *Berlusconi*, could have an impact on the court jurisdiction of acts of the SRM, as the same rules laid down in this judgment could be also applied on acts of the SRM. Based on judgements in specific cases regarding the SSM, including in case C-219/17 as well as other judgements and legal literature, a test was developed for finding out if EU courts or national courts have the jurisdiction over the legality of acts within composite procedures. Stage 1 of the test determines if the EU institution or national authority has the formal final decision-making power regarding the act being tested. Stage 2 of the test determines if the authority making the final decision has full or limited discretion in making the decision regarding the act being tested. Stage 3 of the test combines the answers for stages 1 and 2, and provides the final answer regarding jurisdiction over an act being tested. It was found that, as the SRM resembles the SSM conceptually, structurally, and materially, there are no essential impediments to applying the test on all decisions to initiate procedures, preparatory acts, non-binding proposals, and final binding acts adopted by authorities within the SRM. The EU courts have jurisdiction over acts formally adopted by the Board, the

Commission, or the Council, regardless of being bound by acts by national authorities or not, and national courts have jurisdiction over binding acts formally adopted by national authorities. If there is no limitation of discretion for the EU institution, the jurisdiction of EU courts widens to include decisions to initiate procedures, preparatory acts, and non-binding proposals adopted by national authorities as part of composite procedures leading to a final decision by the EU institution. If the EU institution is bound by an act adopted by a national authority, the national court has jurisdiction over that act. A plethora of the most significant acts covered by the SRM were tested, and the jurisdictions over these acts were defined with the help of the test developed. No situations occurred where the discretion of EU institutions was limited by national resolution authority, but several situations became apparent where national resolution authorities were bound by the decisions of EU institutions.

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